Notes

A Uniform Testimonial Privilege for Mental Health Professionals

I. INTRODUCTION

Suppose an individual is suffering from stress-related headaches, and the individual becomes involved in legal proceedings in which this information is relevant. If this individual lives in South Carolina and visits a psychologist about headaches caused by job-related stress, his communications are not protected in legal proceedings by a statutory privilege.[1] However, if this individual were a high school student in North Dakota complaining about school-related stress, the student's confidential communications with a school guidance counselor would be protected by a privilege.[2] In contrast, if the individual were a battered wife living in New Jersey, her communications to a social worker about the stresses of her situation are not protected by a statutory privilege. A uniform testimonial privilege for mental health professionals would provide more consistent protection for similar mental health counseling and more certainty for the individuals seeking help from these professionals.

Testimonial privileges are evidentiary exceptions to the general rule that all persons, when called upon to testify, must present all relevant facts to the court.[3] Privileges covering psychologists, psychotherapists, counselors, and social workers are all designed to protect the confidentiality of therapeutic relationships by limiting the disclosure of the patient's confidential communications in legal proceedings.[4] Although the clients of some mental health professionals are covered by a privilege,[5] not all professionals providing mental health services have privileges to protect their clients' communications.[6] Of the existing mental

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1. South Carolina does have a privilege for "certain communications and observations" for individuals seeking counseling, treatment, or therapy for drug problems from a "confidant." S.C. CODE ANN. § 44-53-140. A confidant includes a "medical practitioner," a psychologist, a full-time staff member of a college or university counseling center, a guidance counselor, or "any professional or paraprofessional staff member of a drug treatment, education, rehabilitation, or referral center." *Id.* at § 44-53-110.

2. N.D. CENT. CODE § 31-01-06.1 (1975).

3. MCCORMICK ON EVIDENCE § 72 (3d. ed. 1984) [hereinafter MCCORMICK]; 81 AM. JUR. 2D *Witnesses* § 141 (1976); 97 C.J.S. *Witnesses* § 252 (1957).

4. S. STONE & R. LIEBMAN, TESTIMONIAL PRIVILEGES 378-79 (1983).

5. For lists of statutes of privilege laws for clients of psychologists, physicians, and social workers, see S. KNAPP & L. VANDECREEK, PRIVILEGED COMMUNICATIONS IN THE MENTAL HEALTH PROFESSIONS app. A (1987); S. STONE, L. LIEBMAN, & R. TAYLOR, *supra* note 4, at 240-46 (Supp. 1989).

6. Not all mental health professionals are covered by a privilege. However, counselors, psychologists, and other professionals have professional codes of ethics that require these professionals to maintain their clients' communications in confidence. Confidentiality is an ethical decision not to reveal clients' confidences. In contrast, a privilege is a legal right not to testify in legal proceedings about a client's communications. G. COREY, M. COREY, & P. CALLANAN, ISSUES AND ETHICS IN THE HELPING PROFESSIONS 170-74 (2d ed. 1984); L. FISCHER & G. SORENSON, SCHOOL LAW FOR COUNSELORS, PSYCHOLOGISTS, AND SOCIAL WORKERS 13-16 (1985); D. HUMMEL, L. TALBUTT, & M. ALEXANDER, LAW AND ETHICS IN COUNSELING 53-55 (1985). *See* State v. Harris, 51

health privileges, some are absolute, meaning that the privileges apply regardless of the court's need for the information in a particular legal proceeding.[7] Other privileges are qualified because the privileges apply based on the court's ad hoc determination of the particular need for the information in a particular case.[8]

One solution to the inequitable protection of clients' communications is to enact a single, qualified privilege that covers all mental health professionals. This Note discusses the current status of mental health privileges[9] and proposes a uniform privilege to provide more equitable coverage.[10] This Note also discusses the policy arguments both for and against enacting the proposed privilege.[11]

II. CURRENT EXPLANATIONS FOR ENACTING PRIVILEGES

Although privileges historically were created by the courts, legislatures have been the dominant creators of privileges since the nineteenth century.[12] Several theories have been proposed to explain the recognition of privileges for some professional relationships but not for others. Among the current theories are the utilitarian rationale, the privacy rationale, and the power theory.

A. *The Utilitarian Rationale*

According to the utilitarian rationale, legislatures should create privileges when society is served more by encouraging a particular relationship than society is hurt by the potential loss of information caused by the privilege.[13] The utilitarian rationale is the traditional justification offered for creating privi-

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Wash. App. 807, 812-13, 755 P.2d 825, 828-29 (1988) (Although administrative regulations impose strict confidentiality requirements, the confidentiality regulations do not reflect the existence of a general testimonial privilege for mental health professionals.).

7. *In re* Gail D., 217 N.J. Super. 226, n.3, 525 A.2d 337, 340 n.3 (1987); MCCORMICK, *supra* note 3, at §77; N. ROGERS & C. MCEWEN, MEDIATION: LAW, POLICY, AND PRACTICE 115 (1989).

8. State v. Mayhand, 298 N.C. 418, 428-29, 259 S.E.2d 231, 239 (1979) (judge may compel disclosure under a qualified physician-patient privilege when disclosure is necessary for the proper administration of justice); *In re* Pittsburgh Action Against Rape, 494 Pa. 15, 60-61, 428 A.2d 126, 131 (1981) (absolute privilege rejected; society has interests in every man's evidence and in basic fairness); MCCORMICK, *supra* note 3, § 77; 25 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5542, at 318 (1989).

9. *See infra* notes 12-56 and accompanying text.

10. *See infra* Part IV A.

11. *See infra* notes 57-116 and accompanying text.

12. Generally, courts defer to legislatures to create new privileges. *See, e.g.*, Branzburg v. Hayes, 408 U.S. 665, 706 (1972) (four members of Supreme Court suggesting that courts should yield to legislatures in creating and defining privileges); People v. Dixon, 161 Mich. App. 388, 393, 411 N.W.2d 760, 763 (1987) (creation of parent-child testimonial privilege best left to legislature); *In re* Parkway Manor Healthcare Center, 448 N.W.2d 116, 121 (Minn. Ct. App. 1989) (court deferred to legislature to create a privilege for self-evaluation data); People v. Doe, 61 A.D.2d 426, 434-35, 403 N.Y.S.2d 375, 381 (1978) (deferred to legislature to create parent-child privilege); Cook v. King County, 9 Wash. App. 50, 52, 510 P.2d 659, 661 (1973) ("Although 'privilege' is a common-law concept, the granting of a testimonial privilege is a recognized function of legislative power."); MCCORMICK, *supra* note 3, at § 75.

13. *See generally* S. KNAPP & L. VANDECREEK, *supra* note 5, at 8; MCCORMICK, *supra* note 3, at § 72; Smith, *Medical and Psychotherapy Privileges and Confidentiality: On Giving With One Hand and Removing With the Other*, 75 KY. L.J. 473, 477 (1986-87).

leges.[14] Theorists have stated the criteria necessary for a privilege to meet the utilitarian rationale in several ways.[15] However, Dean Wigmore has perhaps been the most influential theorist supporting the utilitarian view.[16] Almost all privileges enacted in the 1960s were evaluated according to Wigmore's four criteria for evaluating a privilege. Wigmore's criteria are the following:

> (1) Does the communication originate in the belief that it will not be disclosed? (2) Is the inviolability of that confidence essential to achieve the purpose of the relationship? (3) Is the relationship one that society should foster? (4) Is the expected injury to the relationship, through fear of later disclosure, greater than the expected benefit to justice in obtaining later testimony?[17]

The psychotherapist-patient privilege was one of the earliest mental health professional privileges to satisfy the utilitarian rationale[18] and meet Wigmore's criteria.[19] First, communications between psychotherapists and patients originate with the belief that patients' communications will not be disclosed. Second, successful therapy requires the maintenance of confidentiality. If patients do not have the assurance of confidentiality, then patients will not feel free to divulge their innermost thoughts and feelings to their psychotherapists, and therapy will be less effective. Third, the public supports therapeutic relationships. Evidence of this support includes federal and state money that is used to support psychotherapy; that states require psychotherapists to obtain training and a license; and that prisons, hospitals, and schools make therapy available.[20] Finally, if patients' communications are not privileged, the injury done to psychotherapy will not be compensated by greater effectiveness in the administration of justice.[21] Proponents of other mental health privileges have used similar arguments to meet Wigmore's criteria and satisfy the utilitarian rationale.[22]

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14. *See, e.g.*, Commonwealth v. Lloyd, 523 Pa. 427, 567 A.2d 1357 (1989) (Larsen, J., dissenting) ("it is generally conceded today that the sole justification for such privileges is . . . the social utility of the particular relationship"); *In re* Embick, 351 Pa. Super. 491, 499-500, 506 A.2d 455, 460 (1986) ("There can be no doubt that the purpose of the psychologist-client privilege is to encourage people to seek professional help for their mental or emotional problems, and that purpose is best accomplished when people in need of psychotherapeutic treatment know that what they tell their therapist during treatment will not be disclosed to anyone."); S. KNAPP & L. VANDECREEK, *supra* note 5, at 8; S. STONE & R. LIEBMAN *supra* note 4, at § 7.02.

15. S. KNAPP & L. VANDECREEK, *supra* note 5, at 8-12; Saltzberg, *Privileges and Professionals: Lawyers and Psychiatrists*, 66 VA. L. REV. 597, 600-01 (1980).

16. MCCORMICK, *supra* note 3, at § 72.

17. S. KNAPP & L. VANDECREEK, *supra* note 5, at 9. Wigmore advocated a privilege for husbands and wives, government informers, priests, and attorneys. 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2285 (J. McNaughton rev. ed. 1961). However, his criteria for establishing a privilege have been used to argue for establishing a privilege beyond these select few. *See, e.g.*, sources cited *infra* note 22.

18. S. KNAPP & L. VANDECREEK, *supra* note 5, at 7.

19. *Id.* at 9.

20. *Id.* at 10-11.

21. *Id.*

22. *See, e.g.*, Robinson, *Testimonial Privilege and the School Guidance Counselor*, 25 SYRACUSE L. REV. 911, 924-27 (1974) (school counselors); Note, *Rape Victim-Crisis Counselor Communications: An Argument for an Absolute Privilege*, 17 U.C. DAVIS L. REV. 1213, 1221-23 (1984) (rape crisis counselors).

B. *The Privacy Rationale*

A second justification that commentators frequently use to justify privileges is a privacy rationale.[23] This rationale is based on the belief that human relationships are central to human dignity and should be free from state interference.[24] Supporters of this view value human dignity more than they value accurate litigation.[25] Therefore, they argue, certain communications should be protected by a privilege, without considering any greater benefit to society and the legal system.[26]

C. *The Power Theory*

The power theory is a third rationale for explaining why legislatures have created privileges for some professions and not for other professions. This emerging rationale looks beyond the rationales offered by legislatures for establishing particular privileges, and instead looks to the political reality within legislatures. The power theory is that the professions with the money and clients to establish a strong lobby are the professions that receive privileges.[27] Professionals with poorer clients do not have the money nor the political clout to lobby for privileges.

There has always been a strong connection between privilege laws and political influence.[28] Privileges originated in the seventeenth century to protect the professional honor of the English elite.[29] Although professional honor has since been abandoned as a stated justification for creating privileges, several commentators theorize that political strength continues to influence the development of privilege law.[30]

III. THE CURRENT PATCHWORK PATTERN OF MENTAL HEALTH PRIVILEGES

Perhaps as a result of the political climate in legislatures, privileges have developed in a patchwork manner throughout many states. For example, in New Jersey, confidential communications with a doctor,[31] psychologist,[32] victim counselor,[33] and marriage counselor[34] are covered. However, discussions with school counselors or social workers are not protected. In Alabama, privilege

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23. *See generally*, S. KNAPP & L. VANDECREEK, *supra* note 5, at 12-13; MCCORMICK, *supra* note 3, at § 72; *Developments in the Law—Privileged Communications*, 98 HARV. L. REV. 1450, 1480 (1985) [hereinafter *Developments*].

24. S. KNAPP & L. VANDECREEK, *supra* note 5, at 13.

25. *Id.*

26. *Id.*

27. *Developments*, *supra* note 23, at 1493-95; Smith, *supra* note 13, at 479.

28. *Developments*, *supra* note 23, at 1494.

29. *Id.*

30. 25 C. WRIGHT & K. GRAHAM, *supra* note 8, at § 5526; *Developments*, *supra* note 23, at 1494; Hayden, *Should There Be a Psychotherapist Privilege in Military Courts-Martial*, 123 MIL. L. REV. 38 (1989); Note, *The Ohio Physician-Patient Privilege: Modified, Revised, and Defined*, 49 OHIO ST. L.J. 1147, 1151 (1989).

31. N.J. STAT. ANN. § 2A:84A-22.2 (West 1989).

32. *Id.* at § 45:14B-28 (West Supp. 1989).

33. *Id.* at § 2A:84A-22.12.

34. *Id.* at § 45:8B-29 (West 1978 and Supp. 1989).

statutes have been enacted to cover counselors[35] and psychologists.[36] School counselors and social workers are not covered by a statute.

In general, most states have enacted a psychotherapist-patient privilege.[37] Other professions have been less successful in receiving privileges. For example, nurses have not widely received the protection of privileges.[38] The common law did not provide a privilege for nurses, and only a few states have responded to create a statutory privilege.[39] Similarly, school counselors in thirty-two states are unprotected by a specific statutory privilege.[40] Marriage counselors, rape counselors and social workers have received less complete coverage from privilege statutes.[41]

Commentators have noted that patients frequently receive treatment from mental health professionals other than psychotherapists or doctors.[42] In the 1970s, one study found that doctors and psychotherapists treated only sixteen percent of those seeking treatment for mental problems.[43] The study found that social workers treated eighteen percent, nurses treated twenty-nine percent, and various other professionals treated twenty-six percent of the patients seeking treatment.[44] In addition, the study also indicated that more than half of the patients suffering from mental illnesses had incomes below the poverty line.[45] These patients have an equal need for privileges, but these patients do not have the funds or the political clout to lobby for privileges to cover the professionals that are most accessible to poorer clients.

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35. ALA. CODE § 34-8A-21 (1988).

36. ALA. CODE § 34-26-2 (1975).

37. *See, e.g.*, CAL. EVID. CODE § 1014 (West 1986); LA. REV. STAT. ANN. § 13:3734 (West Supp. 1990); ME. R. EVID. 503 (West 1989); NEV. REV. STAT. ANN. § 49.215 (Michie 1986); N.M. R. EVID. 504 (1986); N.D. R. EVID. 503 (1990-91); OR. REV. STAT. § 40.230 (1983); R.I. GEN. LAWS § 5-37.3-3 (Supp. 1983).

38. 23 C. WRIGHT & K. GRAHAM, *supra* note 8, § 5431, at 832.

39. *Id.*

40. The following states have adopted a school counselor-student privilege: Connecticut, CONN. GEN. STAT. ANN. § 10-154a (1986); Idaho, IDAHO R. EVID. 516 (1987); Kentucky, KY. REV. STAT. ANN. § 421.216 (Michie/Bobbs-Merrill Supp. 1988); Maine, ME. REV. STAT. ANN. tit. 20-A § 4008 (Supp. 1988); Michigan, MICH. COMP. LAWS ANN. § 600.2165 (West 1986); Montana, MONT. CODE ANN. § 26-1-809 (1989); Nevada, NEV. REV. STAT. § 49.290 (1986); North Carolina, N.C. GEN. STAT. § 8-53.4 (1988); North Dakota, N.D. CENT. CODE § 31-01-06.1 (1976); Ohio, OHIO REV. CODE ANN. § 2317.02 (Anderson Supp. 1988); Oklahoma, OKLA. STAT. ANN. tit., 70 § 6-115 (West 1989); Oregon, OR. REV. STAT. § 40.245 (1988); Pennsylvania, 42 PA. CONS. STAT. ANN. § 5945 (Purdon 1982 and Supp. 1989); South Dakota, S.D. CODIFIED LAWS ANN. § 19-13-21.1 (1987); Wisconsin, WIS. STAT. ANN. § 118.126 (West 1988).

41. *See, e.g.*, ARK. STAT. ANN. § 17-39-107 (1989) (social workers); CONN. GEN. STAT. ANN. § 52-146k (1989) (sexual assault counselors); FLA. STAT. § 90.5035 (1988) (sexaul assault counselors); KY. REV. STAT. ANN. § 335.170, 421.2151 (Michie/Bobbs-Merrill 1989) (social workers, sexual assault counselor); ME. REV. STAT. ANN. tit. 16, § 53-A (1988) (sexual assault counselors); MD. CTS. & JUD. PROC. CODE ANN. § 9-121 (1989) (social workers); 1986 NEV. STAT. 49.252 (social workers); N.J. STAT. 2A:84A-22.15 (1987) (victim counselors); 42 PA. CONS. STAT. § 5945.1 (1988) (sexual assault counselors); WYO. STAT. § 1-12-116 (1989) (family violence, sexual assault, and victim counselors).

42. 25 C. WRIGHT & K. GRAHAM, *supra* note 8, at § 5526; Comment, *The Psychotherapist-Patient Privilege: Are Some Patients More Privileged Than Others?*, 10 PAC. L.J. 801, 803-04 (1979) (citing NAT'L INST. OF MENTAL HEALTH, DEP'T OF HEALTH EDUC. AND WELF., PUB. NO. (ADM) 76-308, STAFFING OF MENTAL HEALTH FACILITIES, UNITED STATES, 1974, 3 (1976)).

43. 25 C. WRIGHT & K. GRAHAM, *supra* note 8, at § 5525.

44. *Id.*

45. *Id.*

Several cases illustrate the consequences of this patchwork approach to the development of privileges. One example is the 1976 Alaska Supreme Court case of *Allred v. State*.[46] In *Allred*, the police took a suspect into custody for questioning. The suspect asked to see either the psychiatrist who ran a local drug clinic or the clinic coordinator that had counseled the suspect.[47] Although the clinic coordinator had treated the suspect, the coordinator was actually licensed as a social worker rather than as a psychiatrist. Psychiatrists, but not social workers, were covered by Alaska's privilege statutes. Because the police contacted the clinic coordinator rather than the psychiatrist, the suspect's communications with the social worker were denied statutory protection because the suspect spoke with the social worker rather than the psychiatrist.[48]

Similarly, in a 1985 Indiana case, a juvenile's statements to his caseworker at a residential juvenile facility were not protected.[49] Statutory privileges existed in Indiana for school counselors and for certified psychologists.[50] Despite these privileges, the juvenile's statements were admissible because a privilege had not been created to specifically include juvenile caseworkers at residential juvenile facilities, even though the caseworker's function was to provide services similar to those that school counselors or certified psychologists provide in other settings.

The consequences of patchwork development are also illustrated by *Lipsey v. State*.[51] In *Lipsey*, the Court of Appeals of Georgia held that a chaplain and a behavior specialist were not covered by the state's privileges for psychiatrists or psychologists.[52] Both the chaplain and the behavior specialist were workers at a community clinic. The chaplain performed intake evaluations, and the behavior specialist held regular counseling sessions.[53] In deciding that the psychologist and psychiatrist privileges did not apply, the court said that confidential communications to other mental health professionals arguably should be privileged.[54] However, the court could not extend a privilege since the legislature had not felt a privilege was necessary.[55]

Relying on legislatures to recognize privileges has led to the patchwork development of privilege law and to inequitable consequences. Privileges have been almost uniformly enacted for attorneys, psychotherapists, and clergy.[56]

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46. 554 P.2d 411 (Alaska 1976).

47. *Id.* at 413.

48. Although the court refused to extend the statutory psychotherapist-patient privilege to the social worker, the court created a common-law privilege to protect the suspect's statements. *Id.* at 422.

49. *In re* L.J.M. 473 N.E.2d 637 (Ind. App. 1985).

50. *Id.* at 642.

51. 170 Ga. App. 770, 318 S.E.2d 184 (1984).

52. *Id.* at 770-34, 318 S.E.2d at 184.

53. *Id.* at 771-72, 318 S.E.2d at 185-86.

54. *Id.* at 772, 318 S.E.2d at 187.

55. *Id. See also* Myers v. State, 251 Ga. 883, 310 S.E.2d 504 (1984) (communications between patient and nurse at mental health unit not covered by psychiatrist-patient privilege); White v. State, 180 Ga. App. 185, 348 S.E.2d 728 (1986) (communications between defendant and social worker at a community center not covered by psychologist-patient privilege); State v. Red Paint, 311 N.W.2d 182, 184 (N.D. 1981) (communications to executive director of juvenile institution not protected by privileges for attorneys, clergy, or school counselor privilege).

56. For surveys of privileges, see J. BUSH & W. TIEMANN, THE RIGHT TO SILENCE app. I (3d. ed. 1989); S. KNAPP & L. VANDECREEK, *supra* note 5, at app. A; 8 J. WIGMORE, *supra* note 17, at §§ 2285-86.

However, professions with less wealthy clients have received less privilege protection. A single privilege covering all mental health professionals would provide more equitable coverage to the clients of all mental health professionals.

IV. ENACTING A UNIFORM MENTAL HEALTH PRIVILEGE

A. *A Proposed Privilege for Mental Health Professionals*

To avoid the inequality created by the current system of enacting privileges, legislatures should enact a single, qualified privilege that covers all mental health professionals. The privilege might read as follows:

> No mental health professional shall testify in any civil or criminal proceeding concerning confidential communications made to the professional by the client in the course of the relationship or concerning advice to the client. However, a judge may compel disclosure either at or prior to trial if, in the circumstances of the case, society's interest in the administration of justice outweighs society's interest in fostering the professional relationship.
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> (a) "Mental health professionals" include all persons who participate in the diagnosis or treatment of mental or emotional conditions. Mental health professionals include, but are not limited to, psychiatrists, psychologists, licensed professional counselors, school counselors, social workers, and individuals who have been trained to provide services at mental health centers.
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> (b) "Mental health centers" include any clinic or other facility that provides inpatient or outpatient service for the diagnosis or treatment of an individual's mental condition.

This proposed privilege is unique because no state currently has a single, qualified privilege that covers all mental health professionals. However, several states have enacted privileges that have some similarities to this proposal. For example, North Carolina's statutory scheme is one alternative that has some similarities to the proposed privilege. North Carolina has enacted a series of qualified privileges, but these privileges cover only specific mental health professionals. North Carolina's privilege statutes cover psychologists,[57] school counselors,[58] family therapists,[59] social workers,[60] and counselors.[61] The advantage of the proposed privilege is that a court can extend protection beyond these specified professionals. In the context of a particular case, a court can weigh the need for the information against society's interests in protecting the professional relationship.[62] For example, a court could extend the protection of the privilege to volunteers on suicide prevention lines.[63]

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57. N.C. GEN. STAT. § 8-53.3 (1989).
58. *Id.* at § 8-53.4.
59. *Id.* at § 8-53.5.
60. *Id.* at § 8-53.7.
61. *Id.* at § 8-53.8.
62. *See infra* discussion under Part C 1.
63. Kentucky has recently enacted a "counselor-client" privilege that is similar to North Carolina's scheme. Rather than have a series of qualified privileges that cover specific mental health professionals, Kentucky includes a specific list of protected professionals within a single statute. Regardless of the statutory structure, like North Carolina, Kentucky's privilege does not allow courts to extend the statutory privilege to any profession that is not listed in the statute. *See* Ky. H.B. 214, § 28, Rule 506 (1990).

Another existing alternative to the proposed privilege is Vermont's "patient's privilege."[64] Unlike North Carolina's privileges, the patient's privilege does not merely cover a specified list of professionals. The "patient's privilege" covers the patients of doctors, dentists, nurses, and qualified mental health professionals that are "designated by the Commissioner of Mental Health."[65] Unlike the privilege statutes in most states, Vermont's legislature has delegated some of its power to create privileges to the Commissioner of Mental Health. The Commissioner can add additional professionals to the list of those covered by the privilege.[66] Despite the Commissioner's ability to cover additional professionals, Vermont's list of protected professionals is specific because only the professionals designated by the legislature or the Commissioner are covered. Like the proposed privilege, Vermont's privilege may reduce the impact of politics in the legislatures by delegating some authority to the Commissioner.

There are at least two difficulties with Vermont's privilege. First, Vermont's system may be politically difficult to enact. Legislatures are perhaps reluctant to share their privilege-making power with another official. A second difficulty with Vermont's system is that the system does not as closely meet the needs of justice as well as the proposed privilege does. Like systems in which the legislature promulgates all of the privileges, Vermont's system cannot rise to meet the needs of an individual in the context of a particular case. For example, suppose a rape victim speaks to a rape crisis counselor in Vermont and legal proceedings arise in which these conversations are relevant information. If the legislature or the Commissioner has not previously specified that rape crisis counselors are covered by a privilege, then the victim in that particular legal proceeding would not receive the protection of a privilege.[67] The proposed privilege has the advantage of giving courts the ability to consider the interests of justice and to react as cases arise without having to wait for a legislature or a commissioner to enact a privilege before the court can apply one.

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64. VT. R. EVID. 503.

65. VT. R. EVID. 503(a).

66. Vermont's Commissioner of Mental Health has used the authority delegated by the statute to designate specific individuals as qualified professionals, rather than designating whole groups of professionals. Currently an individual who works as a staff member at one of Vermont's community mental health centers may apply for designation. The individual's education and experience is reviewed before the Commissioner designates the individual as a qualified mental health professional. Generally, the individuals who are designated are those individuals who work in emergency services, such as those who sign commitment papers. Telephone interview with Dena Monahan, Assistant Attorney General (assigned to represent the department of mental health) (August 2, 1990); Reporter's Notes, V.R.E. 503 (1983). Although this procedure does help insure that the individuals receiving the privilege are qualified, the privilege has been applied too narrowly to cover mental health professionals in general. For example, school counselors and marriage counselors are not protected by the application of this privilege. Even if individual counselors could apply for designation as a mental health professional, Vermont's system of designating professionals individually would not be a workable alternative to the proposed privilege. Reviewing the applications may be too heavy an administrative burden, and the system may be too costly.

67. Although the victim may not receive the protections of a privilege, other rules of evidence may prevent the victim's statements from being admitted. *See infra* text accompanying notes 103-06.

B. *Why Enact a Privilege to Cover Mental Health Professionals?*

1. *Necessary to Encourage Communications*

Despite the fact that all states, including North Carolina and Vermont, have privileges that protect some mental health professionals, opponents to the proposed privilege may question whether mental health privileges are necessary.[68] McCormick notes that many have questioned the need for the physician-patient privilege based upon the belief that the average physician's patient gives no thought to the remote possibility that the patient's communications could be disclosed in legal proceedings.[69] Since many privileges are enacted based upon the utilitarian justification of encouraging communications, some may consider the privilege to be largely ineffective in achieving its stated objective.[70]

To support this view, privilege opponents may cite a study conducted in 1987 by Daniel Shuman and Myron Weiner. Shuman and Weiner conducted an extensive empirical study to determine the effects of a privilege covering psychotherapists in three states and two Canadian provinces.[71] Lay persons, therapists, psychotherapy patients, and judges were surveyed. The study disclosed that lay persons were generally unaware of whether their state had a privilege.[72] Similarly, most patients were unsure if their state had a privilege statute; only six percent indicated that they would have started therapy sooner if they had known that a privilege existed.[73] Shuman and Weiner's data seems to indicate that the existence of a privilege has very little impact on an individual's decision to seek therapy.[74]

Shuman and Weiner's study may demonstrate that mental health privileges are not effective. According to the frequently advanced utilitarian view, privileges are necessary to encourage clients to communicate more freely with the professional by giving clients the assurance that their communications with the professional will not be disclosed in legal proceedings.[75] If Shuman and Weiner's study is correct, people still seek professional services even though they are unaware that privileges exist. Therefore, a privilege for mental health professionals is ineffective and prevents otherwise relevant evidence from being used in legal proceedings.

Although privilege opponents may cite Shuman and Weiner's study to support their argument that a mental health privilege is unnecessary, the results of the study do not conclusively indicate that a privilege is ineffective. The study

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68. 25 C. WRIGHT & K. GRAHAM, *supra* note 8, at § 5522.

69. MCCORMICK, *supra* note 3, at § 98.

70. *Id.*

71. D. SHUMAN & M. WEINER, THE PSYCHOTHERAPIST-PATIENT PRIVILEGE 81 (1987).

72. *Id.* at 105. Of the lay persons surveyed, only 25% knew or correctly guessed whether a privilege existed in their state or province. *Id.*

73. *Id.* at 107.

74. *Id.* at 135. *See generally*, S. KNAPP & L. VANDECREEK, *supra* note 5, at 31-32 (discussing other privilege studies).

75. Robinson, *supra* note 22, at 924-26; Savrin, *The Social Worker-Client Privilege Statutes: Underlying Justifications and Practical Operations*, 6 PROB. L.J. 243, 244-45 (1985); Comment, *An Analysis of the 1972 South Dakota Counselor-Student Privilege Statute*, 19 S.D.L. REV. 378, 380 (1974); Note, *Testimonial Privileges and the Student-Counselor Relationship in Secondary Schools*, 56 IOWA L. REV. 1323, 1332-37 (1971).

has limited value for several reasons. First, it was conducted in only three states, and the study measured the reactions of only psychotherapy patients. The clients of no other professionals were surveyed; for example, social workers' clients were not surveyed. Second, Shuman and Weiner failed to study the effects on the professional of having a privilege statute covering their profession. Many professionals are uncomfortable with the possibility that they could be called to disclose information about a client in a legal proceeding. As a result of this discomfort, a professional may be less aggressive about encouraging reluctant clients to communicate. A professional's discomfort with the potential of being subpoenaed also can affect the professional's nonverbal behavior.[76] A professional can discourage further communication about a topic with behaviors such as lack of eye contact, a tense posture, lack of natural gestures, or verbal responses that indicate selective inattention to clients' disclosures.[77] Therefore, although the participants in one limited study indicated that they were unaware of whether a privilege existed, privileges may still be justified on the basis of the utilitarian rationale.

2. *Protects Patients' Rights to Privacy*

The utilitarian rationale is not the sole justification that proponents can use to justify adopting the proposed privilege. A second justification is that proposed privilege should be enacted to protect clients' privacy.[78] McCormick has suggested that the use of the privacy rationale as a justification for recognizing privileges is a "healthy and overdue development."[79] In addition, McCormick noted increased support for privileges following the Supreme Court's recognition of constitutional protection for some aspects of privacy.[80] A constitutional right to privacy, whether based upon the federal or a state constitution, is an uncertain basis for recognizing a privilege. Only a few courts have recognized privileges based upon a right of privacy,[81] and generally the courts that have recognized the right to privacy as a basis for a privilege also have recognized that the right is not absolute and may have to yield to important governmental interests.[82] Although a constitutional right to privacy may not be an appropriate basis for recognizing a privilege, recognition of a constitutional right does signal

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76. *Developments*, *supra* note 23, at 1476-77.

77. L. BRAMMER, THE HELPING RELATIONSHIP: PROCESS AND SKILLS 64, 158-59 (1985).

78. MCCORMICK, *supra* note 3, at § 105.

79. MCCORMICK, *supra* note 3, at § 77.

80. *Id.* (citing Griswold v. Connecticut, 381 U.S. 479 (1965); Roe v. Wade, 410 U.S. 113 (1973), rehearing denied 410 U.S. 959).

81. Several factors may account for the limited success of using constitutional arguments to justify privileges. First, "freezing" privileges in a constitution would prevent further development of privileges preventing examination of the underlying rationales and experimentation with privilege structures. S. KNAPP & L. VANDECREEK, *supra* note 5, at 21; Saltzberg, *supra* note 15, at 604, n.15. Second, privileges may conflict with other constitutional rights, such as the rights of defendants to obtain evidence under the sixth and fourteenth amendments, S. KNAPP & L. VANDECREEK, *supra* note 5, at 21; Saltzberg, *supra* note 15, at 604, n.14.

82. *See, e.g.*, Betty J.B. v. Division of Social Services, 460 A.2d 528 (Del. 1983) (parent's right to privacy must yield when a child's future well-being is an issue); *In re* N.H. v. District of Columbia, 569 A.2d 1179, 1184 (D.C. App. 1990) (District's interest in the welfare of a child is sufficiently strong to limit mother's privacy rights).

that privacy is an important value in our society. As an important nonlitigation value, privacy is worthy of being recognized as a justification for establishing a privilege apart from a constituitional basis.

C. *Why Should the Privilege for Mental Health Professionals Be a Qualified Privilege?*

1. *The Cost of the Proposed Privilege Is Reduced If the Privilege Is Qualified*

Qualified privileges allow a case-by-case balancing of the need for information in an individual case against the public policies favoring nondisclosure.[83] In contrast, absolute privileges apply regardless of the need for the evidence.[84] A uniform, qualified professional privilege is flexible enough to cover many different mental health professions without the danger of the loss of too much evidence caused by an absolute privilege. An absolute privilege defined broadly enough to cover all mental health professionals would be reckless because a court would have to apply the privilege and exclude the evidence regardless of the situation and the amount of training the mental health professional had. A qualified privilege lessens the potential that a privilege will be used to deter the court from a correct verdict by allowing the court to order disclosure whenever the court believes disclosure is in the interests of justice.[85]

Although courts are flexible, one commentator suggests that legislatures are the more appropriate branch of government to handle claims of a privilege.[86] Legislatures are not preoccupied by the results in a particular case. Instead, legislatures provide a forum for the necessary balancing of societal values concerning privileges. However, as discussed previously,[87] legislatures have been influenced by special interest groups and politics in the past.[88] The proposed privilege is a workable compromise between legislatures and the courts. For example, legislatures can participate in creating privileges by specifying the type of privilege, the holder of the privilege, the exceptions to the privilege, and the types of proceedings in which the privilege may be asserted. By adopting the privilege proposed in this article, legislatures would guide courts by providing that this privilege is for mental health professionals, by establishing that clients hold the privilege, and by listing exceptions to the privilege. Courts participate in the process of creating privileges by applying the qualified privilege to the specific facts in a proceeding. When applying the proposed privilege, courts determine whether the professional services involved are covered by the privilege. If legislatures establish a qualified privilege, this gives the courts general guidelines in applying the privilege, and the legislature reduces the loss of evidence that an absolute privilege would cause.

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83. *See* S. STONE & R. LIEBMAN, *supra* note 4.
84. *See* sources cited *supra* note 3.
85. 25 C. WRIGHT & K. GRAHAM, *supra* note 8, at § 5542.
86. Savrin, *supra* note 75, at 254-55.
87. *See supra* text accompanying notes 27-30.
88. MCCORMICK, *supra* note 3, at § 75.

Recently the Kentucky legislature took just such a step. The legislature repealed the state's absolute privileges covering various mental health professionals and instead enacted a qualified privilege covering specific professionals. Although courts do not have the flexibility to cover other professionals that the proposed privilege would provide, Kentucky courts are able to weigh the interests of justice in determining whether the newly-enacted privilege should apply.

2. *A Qualified Privilege May Provide More Certainty to Clients than Absolute Privileges That Are Subject to Numerous Exceptions*

Opponents may argue that a qualified privilege does not provide enough certainty to further the purposes of the privilege. If the justification for creating a privilege is to encourage clients to communicate with professionals or to protect a client's privacy, these opponents may argue that the purpose of the privilege is undermined by providing only qualified protection rather than absolute protection.[89]

Although opponents of the proposed privilege may argue that an absolute privilege is necessary, proponents of the proposed privilege should respond that a qualified privilege is necessary because the proposed privilege potentially covers many professions. Since the privilege potentially applies in many situations, courts must be able to consider the interests of justice when applying the privilege. A qualified privilege keeps the privilege from being used to deter the ccurt from a correct verdict.[90] Qualified privileges for mental health professionals are not common, and therefore it is hard for opponents to make reliable generalizations about the effect of a qualified privilege.[91] However, qualified privileges commonly protect the confidential communications between journalists and their informants. Informants have not been silenced by the potential that their identity may be revealed if the underlying purposes of the privilege is outweighed by the circumstances in a particular case.[92]

Although expressly qualified privileges may not be as common for mental health professionals as they are for journalists, some mental health professionals are protected by absolute privileges with many exceptions.[93] The proposed qualified privilege would not provide any less certainty than absolute privileges with many exceptions. One commentator has noted that these absolute privileges do not seem to have had a detrimental effect on clients' willingness to disclose to professionals, even though some privileges contain such a large number of exceptions that the privilege is rendered ineffective in almost any situation in which it is likely to be asserted.[94] Broad exceptions may cause more of a client's

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89. *See supra* text accompanying notes 12-21.

90. S. KNAPP & L. VANDECREEK, *supra* note 5, at 37.

91. *Id.*

92. *See* S. STONE & R. LIEBMAN, *supra* note 4, at §§ 8.01, 8.09, 8.17.

93. *E.g.*, CAL. EVID. CODE § 1014 (West 1990); CONN. GEN. STAT. ANN. § 52-146 (West 1990); OHIO REV. CODE ANN. § 2317.02 (Baldwin 1989).

94. Smith, *supra* note 13, at 502-24, 548-49; *see, e.g.*, CAL. EVID. CODE § 1014 (establishing a psychotherapist-patient privilege); CAL. EVID. CODE § 1016 (exception when patient brings his mental condition into issue in a legal proceeding); CAL. EVID. CODE § 1017 (exception when a court appoints a psychotherapist to examine patient); CAL. EVID. CODE § 1018 (exception when psychotherapist consulted to further a crime or a fraud); CAL.

communications to be disclosed than if the privilege were qualified. If the proposed mental health privilege were to be adopted, a judge could balance the need for the testimony against the further damage that could be caused to the client by having her confidential communications disclosed in a legal proceeding.[95] Therefore, a client may actually receive greater protection from a qualified privilege than from an absolute privilege that has broad exceptions.

In addition to the exceptions that are specifically included in some "absolute" privileges, all absolute privileges also have to yield to constitutional considerations. For example, the sixth amendment guarantees criminal defendants' rights to confront the witnesses against them.[96] One important right of confrontation is cross-examination. To cross-examine a witness effectively, attorneys may try to discover documents containing privileged information, such as exculpatory evidence or statements inconsistent with the client's testimony.[97]

Although the Supreme Court has not explicitly held that a privilege may not infringe on a defendant's right of confrontation, the Supreme Court has indicated that a confidentiality statute may not interfere with a defendant's right. In *Davis v. Alaska*,[98] a trial judge did not allow a defendant to question a witness about the witness' juvenile record because a state statute protected the confidentiality of the records. The Supreme Court held that the confrontation clause was violated by the statute when the effect of the statute denied the defense an opportunity to impeach one of the prosecution's main witnesses.[99] Thus, by failing to mention that the privilege may have to yield to constitutional concerns, many absolute privileges provide a false sense of security to professionals and their clients.

In *In re Pittsburgh Action Against Rape*,[100] the Pennsylvania Supreme Court considered the constitutional implications of privileges when the court

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EVID. CODE § 1020 (no privilege when psychotherapist's breach of duty is an issue); CAL. EVID. CODE § 1022 (no privilege when issue concerns a writing, such as a deed or will, of a deceased patient); CAL. EVID. CODE § 1023 (no privilege when proceeding is to determine the sanity of a defendant); CAL. EVID. CODE § 1024 (no privilege when patient is a danger to self or others); CAL. EVID. CODE § 1025 (no privilege in a proceeding to establish competence); CAL. EVID. CODE § 1027 (no privilege when psychotherapist is required to make a public report); CAL. EVID. CODE § 1027 (no privilege for patient under sixteen who is a victim of a crime).

95. For a discussion of a rape victim's need for confidentiality and the possible consequences of disclosing the victim's communications in court, see *In re* Pittsburgh Action Against Rape, 494 Pa. 15, 60-61, 428 A.2d 126, 146-47, 149 (1981) (Larsen, J., dissenting).

96. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him.").

97. J. MYERS & N. PERRY, CHILD WITNESS LAW AND PRACTICE § 8.5 (1987).

98. 415 U.S. 308 (1974). *See also* G. WEISSENBERGER, FEDERAL EVIDENCE § 501.3 (discussing constitutional limits on privileges).

99. *Davis*, 415 U.S. at 320; *accord In re* Robert H., 199 Conn. 693, 509 A.2d 475 (1986); Bobo v. State, 256 Ga. 357, 349 S.E.2d 690, 692-93 (1986) (discussing defendant's right to confrontation as applied to privileged communications); Annotation, *Constitutionality, with Respect to Accused's Rights to Information or Confrontation, of Statute According Confidentiality to Sex Crime Victim's Communications to Sexual Counselor*, 43 A.L.R. 4th 395 (1985). However, the extent of the defendant's constitutional right to confrontation may be somewhat limited. "The Confrontation clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." Delaware v. Fensterer, 474 U.S. 15 (1985). In Pennsylvania v. Ritchie, 480 U.S. 39, 51-54 (1987), a plurality of justices said that the sixth amendment's confrontation clause does not extend to pretrial discovery. The right to confront witnesses is a trial right only and not a constitutionally compelled rule of pretrial discovery.

100. 494 Pa. 15, 428 A.2d 126 (1981).

considered creating a privilege for rape crisis counselors. Rather than fashioning a privilege that appeared to be absolute, the Pennsylvania Supreme Court created a privilege for rape crisis counselors that balanced these interests.[101] The court rejected the crisis center's arguments for an absolute privilege by recognizing that "the prosecution must allow the defense to examine statements in its possession given by persons who testify as prosecution witnesses."[102] Like the rape crisis counselor privilege established by the Pennsylvania Supreme Court, the proposed mental health professionals' privilege balances the interests of justice against the need for the relationship. The proposed privilege does not mislead professionals or their clients.

Even when the privilege is qualified, other alternatives exist that may prevent a client's communications from being disclosed in legal proceedings. One alternative that offers protection is the prohibition against hearsay. Hearsay is defined as an out-of-court statement introduced to prove the facts asserted in the statement.[103] Depending upon how the professional's testimony is used, the entire conversation between the professional and the client could be kept out of court by the hearsay prohibition. For example, in *Glisson v. State*,[104] the Court of Appeals of Georgia recently refused to admit testimony by a school counselor about alleged incidents of incest on the basis of inadmissible hearsay.[105] When a party is seeking discovery from a mental health professional, a second alternative to relying on the privilege is for the professional to request a protective order. Under Federal Rule 26(c), courts have broad discretion to protect a person from "annoyance, embarassment, oppression, or undue burden or expense."[106] The judge may weigh the burden of the counselor's testimony against the need for the testimony under Rule 26 and determine that the burden on the patient and the counselor is too great.

D. *Why Should the Privilege Be a Uniform Privilege That Covers All Mental Health Professionals?*

1. *Simpler for Clients to Understand*

One advantage of the proposed privilege is that it is simpler for clients to determine whether the privilege covers their relationships with professionals. In *Allred v. State*,[107] a suspect accused of a crime wanted to speak to someone from the treatment facility where he had received counseling. In that state, psychotherapists were covered by a privilege but social workers were not. If the suspect had understood the distinctions in application of the statutory privilege,

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101. *Id.*

102. *In re* Pittsburgh Action Against Rape, 494 Pa. at 27, 428 A.2d at 131 (quoting Commonwealth v. Grayson, 466 Pa. 427, 428, 353 A.2d 428, 429 (1976)). *See also* Commonwealth v. Lloyd, 523 Pa. 427, 567 A.2d 1357 (1989) (disallowing access to victim's psychotherapeutic records denied defendant his right to confrontation).

103. MCCORMICK, *supra* note 3, at § 246.

104. 188 Ga. App. 152, 372 S.E.2d 462 (1988).

105. *Glisson*, 188 Ga. App. at 153-55, 372 S.E.2d at 464-65.

106. FED. R. CIV. P. 26(c); *see generally* J. FRIEDENTHAL, M. KANE & A. MILLER, CIVIL PROCEDURE 413-15 (1985).

107. 554 P.2d 411 (Alaska 1976).

he could have chosen to speak to the psychotherapist rather than the social worker. If clients are more aware, the privilege will be more effective at fostering communications with professionals than are current individual privileges. The privilege will also be fairer in its outcomes because the determinative factor of whether communications are privileged will not be the chance that an individual spoke to a therapist rather than to a social worker.

2. *More Equitably Covers All Classes of People*

In addition to a qualified privilege being more effective because it is simpler, professions with poorer clients or less powerful lobbies would also receive protection from the privilege. Some commentators have argued for extending statutory privileges beyond psychologists and psychotherapists.[108] They recognize that by confining the privileges to high-paying professionals, the poor are discriminated against because money may be the only determining factor in choosing one type of professional over another.[109] For example, social workers, crisis counselors, and parole officers could be covered by the proposed privilege.

Opponents may argue that adopting the proposed privilege will result in the loss of too much evidence. Once a privilege is adopted to cover all groups that claim to provide emotional care, it is difficult to explain why the privilege should not extend to any relationship that provides emotional support. One commentator noted that almost any kind of conversation is therapeutic and many personal relationships are based upon satisfying the personal needs of the individuals involved.[110] For example, opponents who favor a privilege only for psychotherapists and their patients ridicule the idea of extending the privilege to other professions by proposing a privilege for beauticians and bartenders.[111]

Although opponents may assert that many relationships may provide emotional support and that too much evidence will be lost by enacting the proposed privilege, this is not true because the proposed privilege does not cover all relationships. When courts apply the proposed privilege, they will be able to prevent the loss of too much evidence by considering the interests society has in fostering the relationship in question.[112] One factor in considering the interest society has in the relationship is the amount of training the mental health professional has had. Although many relationships may have a therapeutic effect, not all relationships should be protected. Some beauticians and bartenders may effectively help their customers who confide in them, but a state should not protect these relationships with a privilege. These untrained individuals are less likely to be effective than individuals who have received training in counseling skills. Although volunteers on suicide prevention lines or in other community programs do not have the years of training that psychologists or psychiatrists have, basic

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108. Savrin, *supra* note 75, at 245-54; Note, *The Psychotherapist-Patient Privilege in Washington: Extending the Privilege to Community Mental Health Clinics*, 58 WASH. L. REV. 565, 574 (1983).

109. Savrin, *supra* note 75, at 253-54; Note, *supra* note 108, at 574.

110. Fisher, *The Psychotherapeutic Professions and the Law of Privileged Communications*, 10 WAYNE L. REV. 609, 645 (1964).

111. 25 C. WRIGHT & K. GRAHAM, *supra* note 8, § 5525, at 175-76.

112. *See supra* discussion under Part C 1.

counseling skills can be learned in a very short period of time. Volunteers should be included within the proposed privilege because volunteers at crisis centers receive some training in basic counseling skills.[113] This training is designed to help them perform their role effectively, and the clients seeking counseling from them are likely to expect that their communications with the volunteer counselor will be privileged. In contrast, customers of bartenders or beauticians are less likely to expect that their conversations will remain confidential, especially if they take place in a crowded bar or beauty shop. "Image counselors" are counselors who help clients design a new wardrobe, stand straighter or speak better; these counselors may have some similarities to beauticians, but image counselors may be more likely to be covered by the model privilege if the need for their testimony is not great and if the client communicated to the image counselor in confidence. A qualified privilege designed to cover mental health professionals does not result in the loss of too much information. The proposed privilege allows the court to carefully consider the communications and the circumstances of the case to arrive at a correct verdict.

3. *Eases the Burden in Conflict of Laws Decisions*

When deciding whether a privilege should apply, courts performing a conflict of laws analysis usually consider the policy interests of the respective jurisdictions which are connected to the litigation.[114] Usually the forum state has a strong interest in accurately deciding the dispute.[115] However, the forum may have no interest in applying the privilege rules of another state.[116] If the states adopt a uniform privilege for mental health professionals, clients will have more assurance that their communications will not be disclosed regardless of the forum involved.

V. CONCLUSION

Perhaps as a result of the political climate in state legislatures, privileges for mental health professionals have developed inconsistently within many states. Many mental health professions perform similar therapeutic functions. However, psychologists and psychiatrists are more likely to be covered by statutory privileges than are groups with less powerful clients, such as social workers and school counselors.

One solution to the current patchwork development of privilege laws is to enact a single, qualified privilege to cover all professions who participate in the diagnosis or treatment of mental or emotional problems. There are several benefits to enacting a single, qualified privilege. One benefit is that a qualified privilege allows courts to perform a case-by-case analysis of the need for the infor-

113. Some states establish a minimum number of hours required for volunteer training. *See, e.g.*, CAL. EVID. CODE § 1037.1 (1989) (40 hours); CONN. GEN. STAT. ANN. § 52-146k (1990) (20 hours); N.J. REV. STAT. § 2A:84-22.14 (1990) (40 hours).

114. MCCORMICK, *supra* note 3, at § 73.2.

115. *Id.*

116. *Id.*

mation versus the policies supporting the privilege. A qualified privilege lessens the potential that the privilege will be used to lead to an inaccurate verdict, and a qualified privilege is necessary to prevent too much evidence from being lost because the proposed privilege covers many professions. In addition, qualified privileges provide no less protection than absolute privileges that are subject to many exceptions and constitutional considerations. Another advantage of the proposed privilege is that the privilege is simpler to understand, and this simplicity will help clients to be more aware of the privilege. If a single, uniform privilege is adopted by many states, the privilege will be easier to apply by courts faced with performing conflicts of law analyses. Finally, a uniform, qualified privilege is beneficial because courts, unlike legislatures, are more sensitive to the potential loss of information caused by privileges and because courts are less sensitive to political pressures.

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